85-1659

Supreme Court, U.S.
FILED
APR 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COAST CATAMARAN CORPORATION and
THE COLEMAN COMPANY, INC.,

Petitioners,

v.

CHARLES R. HASSINGER, Administrator of the
Estate of STANLEY H. HASSINGER, III,
JANET MEAD PROCTOR, Administratrix of the
Estate of ROBERT DIEGO PROCTOR,
JAMES B. POWELL, Administrator of the
Estate of STUART L. POWELL, and
TIDELAND ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW.

IS THE NEXUS REQUIREMENT OF *EXECUTIVE JET* MET IN A PRODUCT LIABILITY CASE MERELY BECAUSE THE PRODUCT IS A BOAT?

II. PARTIES TO THE PROCEEDING.

All parties to the proceeding are listed in the caption. The corporate parents, subsidiaries and affiliates of petitioners (as required by Sup. Ct. R. 28.1) are:

As to Coleman Company, Inc.:
None

As to Coast Catamaran Corporation:
Parent — Coleman Company, Inc.
Affiliates — None, not wholly owned by Coleman.
Non-Wholly Owned Subsidiaries —
Coast Catamaran France, S.A.
Hobie Catamarans, S.A.

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V. OPINIONS IN COURTS BELOW.

The Trial Court by Memorandum of Decision dated April 18, 1985 (1-A) and Order dated May 9, 1985 (18-A) found that admiralty law applied to this products liability action alleging defective design of a sailboat mast. The appellate court allowed an interlocutory appeal (20-A), affirmed the district court's decision (22-A) and denied Appellants' petition for rehearing and suggestion for rehearing in banc by Order dated February 6, 1986 (35-A).

VI. GROUNDS OF JURISDICTION.

Jurisdiction to this Court is invoked pursuant to 28 U.S.C.A. §1254(1) (1968) to review an opinion of the U.S. Court of Appeals for the Fourth Circuit dated January 8, 1986 (22-A) and the Order of that court dated February 6, 1986 (35-A) denying Appellants' petition for rehearing and suggestion for rehearing in banc.

VII. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS.

None.

VIII. STATEMENT OF THE CASE.

These products liability cases arose out of deaths occurring from contact between the aluminum mast of a sailboat and an overhead power line on the shore of Silver Lake in Ocracoke, North Carolina. The suits alleged liability because the mast was conductive, a fact obvious to decedents who had earlier that day hit another overhead power line in the

parking lot prior to launching. Jurisdiction over these defendants was based on diversity of citizenship, 28 U.S.C.A. §1332 (1966).

Appellants filed for summary judgment on the ground that the complaints failed to support any claims against them based upon admiralty law. The District Judge, following then existing Circuit law, *White v. Johns-Manville Corp.*, 662 F.2d. 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982),[1] denied Appellants' motion.

Although the Fourth Circuit had overruled, *sua sponte*, the very principles upon which the district court relied, it affirmed the district court without any discussion of *White*, merely stating:

> As to appellants Catamaran and Coleman, the *four factor* nexus requirement is also satisfied.
>
> First, Catamaran's and Coleman's roles at the time of the accident were those of manufacturer, marketer, supplier, and seller of catamarans. Hassinger Complaint ¶8 (A-23), Powell Complaint ¶6 (A-231).
>
> Second, such vehicles are obviously maritime.
>
> Third, the injury was caused by an allegedly defective mast which, to paraphrase *Oman, supra*, at 229, allowed electricity to spread through the vessel and electrocute three persons.
>
> Fourth, one of the purposes of admiralty law is to protect sailors from defective equipment while they are engaged in maritime activity. *See, e.g., Richards v. Blake Builders Supply, Inc.*, 529 F.2d 745 (4th Cir. 1975); *accord Oman v. Johns-Manville Corp., supra*, at

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[1] *White* was thereafter overruled, *sub nom Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 106 S. Ct 351 (1985).

229; *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 10-11 (1st Cir. 1983).

The wrongs of Coleman and Catamaran, as alleged, therefore satisfy the nexus test of *Executive Jet*.

(33-A). The court restated the four part test it earlier adopted in *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 351 (1985). It then failed to apply this test in the context of an analysis of the nature of the wrong as it had done in *Oman* and as required by *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972). The Court improperly equated "sailors" with Jones Act "seamen," even though the maritime employment relationship so essential to nexus for seaman was lacking.

Appellants' petition for rehearing and suggestion for rehearing in banc were denied. As a result, the panel decision remains in conflict with *Executive Jet*, *Oman* and all other Circuit Court authority concerning nexus. This petition seeks review of that error.

IX. IMPORTANT REASON FOR ALLOWANCE OF WRIT.

THIS DECISION CONFLICTS WITH *EXECUTIVE JET*, AND ALL OTHER CIRCUIT PRODUCT LIABILITY DECISIONS IN FINDING NEXUS WITHOUT ANALYZING THE NATURE OF THE WRONG.

This Court in *Executive Jet*, to return admiralty to its originally intended scope and purpose, gave formal recognition to the budding concept of nexus as a requirement, in addition to situs, for the application of maritime law. This requirement was ". . . that the wrong bear a significant relationship to traditional maritime activity." *Id.* at 268. The Fourth Circuit belatedly recognized and articulated this test in *Oman*, but then proceeded to ignore both the nature of the wrong and its relationship to traditional maritime activity in this case.

The wrong charged was a failure to eliminate the conductivity of the aluminum mast of a Hobie Cat sailboat. The Appellate Court, instead of analyzing the wrong, as required by *Executive Jet*, made a superficial examination of the four factors of *Oman*.[2] The court found nexus by restating four different ways that the product involved was a boat. A proper analysis of the wrong would have revealed that liability turned upon whether and when the conductor involved in the accident should have been insulated. The answer to this question does not depend on whether the insulator was attached to a boat, or whether the accident occurred on water. Thus it was purely fortuitous that the wrong resulted in an injury which occurred upon water, as opposed to land, or that they were handling a mast instead of a ladder. The result below has eliminated the requirement that the "wrong bear a significant relationship to traditional maritime activity" if a products liability action is brought against the manufacturer of a boat.

It is not at issue whether products liability cases can be brought in admiralty. This of course is proper *where nexus exists* but does not address the issue of *whether nexus exists*. There are four landmark decisions in the Fifth and Ninth Circuits which found proper nexus under the *Executive Jet* standard and which were recognized and discussed in *Oman*. The result below conflicts with all of these.

The Fifth Circuit products liability cases finding nexus are *Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319 (5th Cir. 1980) and *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976). That Circuit scrupulously followed *Executive Jet* and found in both instances that the alleged wrong had a significant relationship to a traditional maritime activ-

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[2] *Oman* adopted the popular four factors test of *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). Unfortunately as shown in the opinion below, many courts engage in an exercise of semantics with these factors, using them as an end in themselves and loosing sight of the central issue, i.e., the maritime nature of the wrong.

ity, i.e., the marine catastrophe which it caused: stranding and collision in *Sperry* and sinking in *Jig the Third*.

Two Ninth Circuit cases have reached similar results. *Pan-Alaska Fisheries, Inc. v. Marine Const. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977); *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978). *Pan-Alaska* made no holding on the appropriateness of admiralty jurisdiction; that issue was neither raised nor discussed. *Jones* involved defective construction causing fire and sinking. Both cases were consistent with *Executive Jet* because the alleged wrong resulted in the type of maritime casualty this court enumerated as invoking the concern of admiralty.

Before the result below, the Fourth Circuit in *Oman* recognized nexus exists in products cases when the "products caused injuries to the ship which specifically implicated the maritime concerns discussed by the Supreme Court in *Executive Jet*." *Id.* at 229. Oman referred to the following language of *Executive Jet:*

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters. *When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe.* Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. at 269-270 (emphasis supplied).

The wrong of failing to insulate against the hazard of conductivity can never satisfy nexus. This wrong is equally applicable to injuries not connected with navigation or commerce, e.g., ladders, cranes, antennas, pruning hooks, etc. In this case the wrong has not resulted in a maritime casualty[3] which requires the expertise of a maritime court for its adjudication. The same wrong caused an earlier incident entirely on land, but fortunately no injuries resulted. The only distinction between this earlier power line contact with a boat, and the fatal one was situs. The analysis of the wrong is exactly the same. In extending admiralty law to the resolution of an issue routinely handled by state products liability law concepts, the Fourth Circuit ignored *Executive Jet* and all other circuit authority.

X. CONCLUSION.

Nexus does not exist in products liability cases, like this one, merely because the product is a boat. The *Executive Jet* requirement that the "wrong bear a significant relationship to traditional maritime activity" must still be met. Therefore, certiorari is appropriate to assure proper analysis of the maritime nature of the wrong in product cases involving boats.

Respectfully submitted,

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[3] It is difficult to imagine a situation where this wrong will result in a casualty invoking the concerns of admiralty.

XI. APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CHARLES R. HASSINGER, ADMINISTRATOR of the Estate of STANLEY H. HASSINGER, III,	]	
Plaintiff,	]	
v.	]	No. 83-1077-CIV-5
TIDELAND ELECTRIC MEMBERSHIP CORPORATION, COLEMAN COMPANY, INC., and COAST CATAMARAN CORPORATION,	]	
Defendants.	]	
JANET MEAD PROCTOR, Administratrix of the Estate of ROBERT DIEGO PROCTOR,	]	
Plaintiff,	]	
v.	]	No. 83-1078-CIV-5
TIDELAND ELECTRIC MEMBERSHIP CORPORATION, COLEMAN COMPANY, INC., and COAST CATAMARAN CORPORATION,	]	
Defendants.	]	

MEMORANDUM OF DECISION

This case arises from the electrocutions of three men, Stanley H. Hassinger, III, Robert D. Proctor, and Stuart L.

Powell, which occurred on June 5, 1982, at Silver Lake in Okracoke, North Carolina. The men were killed while beaching Hassinger's 18-foot Hobie Cat sailboat when the top of the mast contacted an overhead power line. Named as defendants in this action are Tideland Electric Membership Corporation ("Tideland"), as the owner and operator of the electric power line, and Coleman Company, Inc., ("Coleman") and Coast Catamaran Corporation ("Coast"), as the alleged designers, manufacturers and sellers of the Hassinger Hobie Cat sailboat. The estates of Stanley Hassinger, III, and Robert Proctor have invoked both the general admiralty jurisdiction of the court (28 U.S.C. § 1333), and admiralty jurisdiction pursuant to 46 U.S.C. § 740 (commonly known as the Admiralty Jurisdiction Extension Act), and the case is presently before the court on defendants' motions to dismiss for want of such jurisdiction.[1]

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[1] The court notes that pursuant to its order of April 17, 1984, the cases "Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor, Plaintiff, vs. Tideland Electric Membership Corporation, Coleman Company, Inc. and Coast Catamaran Corporation, Defendants, Civil Action No. 83-1078-CIV-5"; "Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger, III, Plaintiff, vs. Tideland Electric Membership Corporation, Coleman Company, Inc. and Coast Catamaran Corporation, Defendants, Civil Action No. 83-1077-CIV-5" and "James B. Powell, Administrator of the Estate of Stuart L. Powell, Deceased, vs. Tideland Electric Membership Corporation, Coleman Company, Inc. and Coast Catamaran Corporation, Defendants, Civil Action No. 84-256-CIV-5" were consolidated. This memorandum of decision is applicable to each of these three cases.

Several discovery motions are also pending before the court; the parties are directed to inform the court of the status of these motions within twenty (20) days of the issuance of this decision, after which the court will issue an order addressing those matters still pending. Defendant Coleman's motion for summary judgment is also pending before the court; in order to progress this litigation, the court herein resolves only the admiralty jurisdiction issue, and will rule on defendant Coleman's motion for summary judgment as soon as practicable.

I. Background

During the morning and early afternoon of June 5, 1982, Stanley H. Hassinger, III, Robert Diego Proctor, and Stuart L. Powell, were sailing in two 18-foot Hobie Cat sailboats across Pamlico Sound to Silver Lake in Okracoke, North Carolina, approximately a thirty mile sailing distance. (deposition of H.J. King, IV at p. 25). Rex King, the only survivor of this tragic accident, accompanied Hassinger on Hassinger's boat, and Proctor and Powell were together on Powell's boat. At approximately 1:00 p.m., as the Hassinger and Powell boats entered Silver Lake from Pamlico Sound, the four men began to search for a place to beach their boats.[2] When they spotted what appeared to be an appropriate place, they prepared to beach the two sailboats; it was decided that the Hassinger boat would be pulled ashore first, while the Powell boat remained in the water. In the process of beaching the Hassinger sailboat (a process which required the occupants to get off the boat and pull it ashore), the top of the mast contacted an energized, uninsulated, overhead power line carrying 7,200 volts, and Hassinger, Proctor and Powell were electrocuted; King managed to survive the incident, being thrown or knocked clear of the boat shortly after the mast contacted the power line.[3]

The specific facts surrounding this incident are unclear and are the source of considerable dispute. First, it is unclear whether any portion of the boat was in the water at the time the mast struck the power line. Second, the evidence is also unclear as to whether any of the decedents were in the water

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[2] Silver Lake is a navigable body of water located in Hyde County encompassed by Okracoke, North Carolina. The waters of Silver Lake are tidal waters, subject to the ebb and flow of the tide; in addition, its waters are used for commercial purposes by ferry boats and fishing boats.

[3] It is unclear whether all four men participated in pulling the Hassinger boat ashore, or whether Proctor, Hassinger and King were in the process of beaching the boat when the mast struck the power line, and Powell attempted to rescue his companions.

at the time the mast contacted the wire. Finally, since the power line has been moved since the time of the accident, its exact location is unknown; therefore, whether it constantly extended over the water at the mast contact point, or whether it would have done so only at high tide, is unclear.

II. Admiralty Tort Jurisdiction

A. GENERALLY

All parties agree that the decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), sets forth the controlling criteria for determining whether a tort action is "maritime" and thus within the admiralty jurisdiction of the federal courts. The two-part test of *Executive Jet* requires (1) a maritime locality of the injury, and (2) a "significant relationship to traditional maritime activity" to the alleged wrong. *Id.* at 268, 93 S.Ct. at 254. Therefore, a plaintiff must satisfy both the maritime locality, or "situs," and "nexus" requirements to invoke the admiralty jurisdiction of the district court.[4]

It is now well settled that the admiralty jurisdiction of the court is properly invoked in actions arising out of the use of pleasure craft on navigable waters, and that the *Executive Jet* criteria are applicable thereto. *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982); *Souther v. Thompson*, ——

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[4] The Executive Jet case marked a significant development in the law of admiralty jurisdiction. Prior to Executive Jet, the determination of whether a tort was "maritime" in nature, and thus within the admiralty jurisdiction of the federal courts, depended solely on the locality of the wrong. Therefore, if the tortious conduct occurred on the navigable waters of the United States, the controversy fell within the admiralty jurisdiction. See Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971). In extending the concept of admiralty jurisdiction the Executive Jet court recognized that, "in determining whether there is admiralty jurisdiction over a particular tort . . . , reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." Executive Jet, supra, at 261.

F.2d ____ (No. 84-1532, 4th Cir., February 7, 1985); *Oliver v. Hardesty,* 745 F.2d 317 (4th Cir. 1984). In fact, the court in *Foremost* stated that

> [a]lthough the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce . . . [the] federal interest in protecting commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial activity. This intent can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. *Foremost, supra,* at 674-675 (emphasis in the original).

Though the maritime activity need not be an exclusively commercial one, *id.* at 674, the alleged wrong must bear a significant relationship to traditional maritime activity. In determining whether a sufficient nexus exists vis à vis the alleged wrong, courts now consider the following factors:

> the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law. *Kelly v. Smith,* 485 F.2d 520, 525 (5th Cir. 1973), *quoted in Bendlin v. Virginia Electric and Power Co.,* 449 F.Supp. 934, 936 (E.D.N.C. 1978).

B. DEFENDANT TIDELAND

As previously indicated, the evidence varies substantially as to the location of both the boat and the decedents at the time of the accident. Specifically, the dispute revolves around the question of whether or not the boat and/or the decedents were partially in the water. Because the court finds that the boat and the decedents would have been partially in the water had it been high tide at the time of the accident, however, it is unnecessary to resolve this factual dispute. The

evidence shows that when the mast contacted the power line, the decedents and at least part of the boat were on the portion of the beach located in between the mean high water mark and the mean low water mark. The photographs on which defendant so strongly relies demonstrate this point. (*See specifically* Hoft exhibit 2, from May 14, 1984, deposition of Phillip Hoft.) First, the back portion of the Hassinger Hobie Cat was seaward of the vegetation line; this edge of the vegetation corresponds closely to the mean high water mark. (deposition of Loie Priddy at pp. 101 et seq.). Second, in the foreground of Hoft exhibit 2, an orange pipe stands vertically in the sand at or near the center of the Hassinger Hobie Cat. A land survey conducted by plaintiffs' expert Loie Priddy demonstrates that this orange pipe was approximately twenty (20) feet seaward of the highway. This survey further demonstrates that the mean high water mark was approximately twenty-four (24) feet seaward of the highway. Assuming, as defendant contends, that the photographs accurately depict the position of the boat and height of the water at the time the accident occurred,[5] the photographs and the survey together demonstrate that the Hobie Cat would have been partially in the water at high tide.[6]

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[5] Defendant made this contention, specifically that the boat was not moved before the photographs were taken, at a motions hearing held before the court on December 5, 1983. (transcript at p. 52). The photographs (See specifically Teeter exhibits 4, 6, 7, 8, 9 and 10 showing the boat mast in the power line) and the testimony of many witnesses demonstrate this point. Defendant now contends that the boat was moved seaward and out of the power lines before the photographs were taken. (Only one witness recalls pushing the boat seaward of the power lines immediately after the accident (May 23, 1984, deposition of David B. Fletcher at p. 43)) The court finds the former contention more believable from the evidence.

[6] Defendant's experts contend that there is insufficient data to determine the mean high water mark of Silver Lake. Although defendant's evidence demonstrates that the accident occurred at or very near low tide (Affidavit of Dirk Frankenberg at p. 3 — low tide occurred at approximately 1:13 p.m. on June 5, 1982), defendant does not offer evidence of the water level at high tide on that day. As to the location of the mean high water mark, defendant's experts state that the mean high water line at Silver

(Continued)

The evidence also varies substantially as to the location of the power line. This factual dispute revolves around whether or not the power line, or any portion thereof, extended over the water. In support of its contention that the line extended entirely over dry land, even at high tide, defendant offers the testimony of several witnesses who so observed it. (*See* affidavits of William Bart, Deputy Sheriffs Teeter and Jackson, Murray Fulcher, Ronald T. O'Neal and D.B. Fletcher). In contrast, plaintiffs' evidence shows that the power line extended over the water, at least at high tide (*See* deposition and survey of Loie Priddy, affidavit and photograph of Billy Smith, and deposition of Robert Schafer). Although not critical to the court's analysis,[7] the court finds that plaintiff's evidence on this point is the most credible. Plaintiffs' evidence, particularly Billy Smith's affidavit and photograph, demonstrates that the power line extended over the water at high tide. Three days after the accident, Mr. Smith, accompanied by two of defendant's employees, observed the accident scene. With their assistance, Smith measured and pho-

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Lake cannot be precisely located (Affidavit of Dirk Frankenberg at p. 4; Affidavit of Dr. Leonard Pietrafesa at p. 4), and that the period between March 7, 1980, and April 24, 1980, which represents the only compilation of tidal data, is "entirely too short within which to collect sufficient data to establish the precise mean high water line of Silver Lake" (Dr. Pietrafesa at p. 4). Defendant does not impeach the validity of plaintiff's expert's own methods for determining the approximate mean high water line — visual sightings coupled with a continuous profile of the topography (deposition of Loie Priddy at pp. 91 et seq,) — except by contending that this survey of August 3, 1983, does not reflect the changes since June 5, 1982, due to the natural shifting of sand. Defendant's experts do not suggest, however, the degree to which Mr. Priddy's figures are inaccurate because of this natural shifting of sand over a year's time. Accordingly, the court finds that the Hassinger Hobie Cat was partially seaward of the mean high water line at the time of the accident.

[7] A power line extending entirely over dry land could constitute an obstruction to navigation assuming the maritime locality of the decedents and the existence of the requisite nexus between the wrong and traditional maritime activity, which the court herein finds existed on these facts.

tographed the power line. The height of the wires above the ground was measured with an insulated measuring stick, and a stick was driven in the sand directly beneath the burn point on the wire — which was identified as the point the sailboat mast contacted the power line. The photograph of this stick clearly shows that the power line was seaward of the edge of the vegetation, which corresponds closely with the mean high water mark.[8] (L. Priddy at p. 101).

1. "Situs"

Defendant contends that "situs," or maritime locality, is lacking in that the accident did not occur on or over navigable waters. Critical to defendant's contention is its position that the Hassinger Hobie Cat and the decedents were entirely on dry land at the time of the accident. Assuming the defendant is correct on this point, it is clear that had the accident occurred at high tide, the boat and the decedents would have been partially in the water. (See previous discussion).

There is no question that consistently the mean high water (MHW) line has been accepted as the boundary of navigable waters of the United States. *Willink v. United States*, 240 U.S. 572 (1916), *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). The question here, however, is whether the MHW line is the boundary of admiralty jurisdiction even when the tide is below this line, or whether the water's edge is the test. The court finds that the MHW line is the boundary of admiralty jurisdiction, even when the tide is below this point. Therefore, maritime locality exists until the boat is placed beyond the reach of the tides. To hold otherwise would make the existence or absence of admiralty jurisdiction dependent upon the fortuitous state of the tide. Such a test for

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[8] Billy Smith was accompanied to the accident scene by Deputy Sheriffs Carl Teeter and E.M. Jackson, and Tideland employees Bernard Midgett and Ronald T. O'Neal. None of these men, by affidavit or through deposition, refute Smith's testimony about the taking of these measurements and photographs, or the accuracy thereof.

maritime locality would render the time the accident occurred a critical factor, and is thereby much too inequitable, uncertain and speculative. None of the parties have identified to the court a modern case applying the English Common Law doctrine of divisum imperium, which rendered the common law applicable when the tide was out, and the admiralty law applicable when the tide was in. To hold that admiralty jurisdiction would exist had decedents been electrocuted at high tide, is totally without reason. Such a holding renders the existence of admiralty jurisdiction dependent upon the fortuitous circumstance of the time of day decedents were electrocuted.[9]

2. "Nexus"

Defendant also contends that "nexus," or a significant relationship between the alleged wrong and traditional maritime activity, is lacking. Specifically, defendant contends that:

— decedents were not engaged in traditional maritime activity at the time of the accident;

— even if decedents were engaged in traditional maritime activity, the wrong complained of (the

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[9] Defendant contends that Hastings v. Mann, 340 F.2d 910 (4th Cir. 1965), cert. denied, 380 U.S. 963, is controlling, in that persons standing in the water are considered to be on land, not water, for the purpose of determining admiralty jurisdiction. Hastings v. Mann is a pre-Executive Jet case involving a suit to recover for injuries sustained by plaintiff when he slipped and fell on a boat launching *ramp* while attempting to launch his boat. Plaintiff's injury was found not to be cognizable in admiralty based on the extension of the land doctrine; the ramp was viewed as an extension of the land, just as are a pier or a wharf. Id. at 912. The case at bar, however, does not involve the extension of the land doctrine; rather, the court here is concerned with an obstruction (the power line) and whether or not this obstruction bears a significant relationship to traditional maritime activity (beaching a boat). These points will be addressed in detail in this court's discussion of "nexus."

erection and maintenance of power lines) does not bear a significant relationship thereto; and

— the concerns relate peculiarly to pleasure craft.

The court disagrees with these contentions. First, the act of beaching a vessel does constitute traditional maritime activity. Historically, and even today, vessels are pulled up on the beach with regularity. This act is an ancient and practical solution to the problem of removing the boat from the reach of the tides. As discussed previously, until a vessel is so removed, it remains in navigation.

Second, the wrong, the erection and maintenance of the power lines, does bear a significant relationship to this traditional maritime activity. The factors enumerated by the Fifth Circuit in *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), and applied by this court previously, *See Bendlin v. Virginia Electric and Power Co.*, 449 F.Supp. 934, 936 (E.D.N.C. 1978), are helpful in making this determination. These factors are:

1. the functions and roles of the parties;

2. the types of vehicles and instrumentalities involved:

3. the causation and type of injury; and

4. the traditional concepts of the role of admiralty law. *Id.*

The role of the decedents at the time of the accident was that of a sailor attempting to remove a vessel from navigation; defendant's role was that of owner and operator of a power line, which proved to be a dangerous impediment to this navigational function. The instrumentalities involved are clearly the mast of the vessel and the overhead electric power line; the contact between these instrumentalities resulted in decedents' deaths by electrocution. The act complained of with respect to defendant Tideland is the negligent placing of a dangerous impediment — a power line — to navigation. As-

suming navigation (as the court finds exists herein), "[s]uch activity . . . [is] considered as having a significant relationship to traditional maritime activity within the meaning of *Executive Jet.*" *Brown v. U.S.*, 403 F.Supp. 472 (C.D. Cal. 1975).

Admiralty law traditionally has concerned itself with the protection of sailors from injury or death caused by obstructions to navigation — this concern is the basis of the court's decision herein. In its third contention, defendant maintains that this accident could only have happened to a light sailboat capable of being beached by a few people, and therefore this matter relates peculiarly to pleasure craft. Defendant also contends that the power line posed no threat to commercial shipping or to larger pleasure boats. Once again, however, the court does not agree. The power line was positioned such that had it been knocked or blown down, for instance, it could have been on the beach, and in the water at high tide, thereby endangering any vessel beached in that area. Had the decedents been engaged in commercial activities while beaching the vessel at the same place and time, for example beaching a fishing boat, controlling precedent would doubtless sustain admiralty jurisdiction. As the court reasoned in *Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984), the plaintiffs should not be worse off because the decedents were beaching a pleasure craft. *Id.* at 320. Therefore, the court finds that the power line bears the requisite significant relationship to the traditional maritime activity of beaching a vessel.[10]

In sum, as to defendant Tideland, the court finds that both the situs and nexus requirements for admiralty jurisdiction are met, and that jurisdiction is present under 28 U.S.C. § 1333.[11] Therefore, defendant's motion to dismiss is DENIED.

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[10] The federal concern is that of keeping navigable waters clear of obstructions to navigation; herein lies the need for uniformity.

[11] Since the court finds that jurisdiction is present under 28 U.S.C. § 1333, it is not necessary to address whether jurisdiction also exists under the Extension of Admiralty Act, 46 U.S.C. § 740.

3. Federal Question Jurisdiction

As an independent jurisdictional base, plaintiffs assert violations of two federal statutes — 33 U.S.C. § 403[12] (a section of the Rivers and Harbors Appropriation Act) and 14 U.S.C. § 85.[13] Neither statute explicitly creates a private enforcement mechanism. Plaintiffs assert, however, that such private right can be implied on behalf of those allegedly suffering direct, fatal injuries as a result of the claimed violation.

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[12] 33 U.S.C. § 403 provides:
The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.

[13] 14 U.S.C. § 85 provides:
The Secretary shall prescribe and enforce necessary and reasonable rules and regulations, for the protection of maritime navigation, relative to the establishment, maintenance, and operation of lights and other signals on fixed and floating structures in or over waters subject to the jurisdiction of the United States and in the high seas for structures owned or operated by persons subject to the jurisdiction of the United States. Any owner or operator of such a structure, excluding an agency of the United States, who violates any of the rules or regulations prescribed hereunder, commits a misdemeanor and shall be punished, upon conviction thereof, by a fine of not exceeding $100 for each day during which such violation continues.

As indicated by the Supreme Court in *California v. Sierra Club*, 451 U.S. 287, 292-293 (1981), *Cort v. Ash*, 422 U.S. 66 (1975), provides the approach for determining whether a private right of action should be implied from a federal statute. This approach lists four factors which are relevant to the inquiry:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78.

The language of both statutes states no more than a general proscription of certain activities; neither statute focuses on any particular class of beneficiaries whose welfare Congress intended to further. As the court found in *Sierra* with reference to the Rivers and Harbors Appropriation Act (of which 33 U.S.C. § 403 is a part), the language of the Act "is the kind of general ban which carries with it no implication of an intent to confer rights on a particular class of persons." 451 U.S. at 294. The court finds that this language applies to 14 U.S.C. § 85 as well. Such finding is strengthened with the knowledge that plaintiffs have not identified anything in the legislative histories of either statute suggesting 33 U.S.C. § 403 or 14 U.S.C. § 85 was created for the especial benefit of a particular class. The court therefore finds that the holding in *Sierra* applies with equal force to both statutes. That is, silence as to the existence of a private remedy in both the statute and the legislative history "serves to confirm that in enacting the Act, Congress was concerned not with private rights but with the Federal Government's ability to respond

to obstructions on navigable waterways." *Id.* at 296[14] Thus, neither statute is the basis for an independent cause of action, although each is pertinent to plaintiff's cause of action in admiralty in determining the applicable standard of care. *See, e.g., Ison v. Roof*, 698 F.2d 294 (6th Cir. 1983). Accordingly, defendant's motion to dismiss these Federal question claims is GRANTED.

C. DEFENDANTS COAST AND COLEMAN

1. Admiralty Jurisdiction

Since the court has already found the existence of maritime locality,[15] the only question remaining as to these defendants is whether the wrong complained of — defective design and manufacture of the sailboat mast — bears a significant relationship to traditional maritime activity. Plaintiffs contend that because defendants have manufactured a uniquely maritime product — the sailboat mast — any defect in the design and/or manufacture of that product is a maritime concern. Conversely, defendants maintain that any such defect does not relate to the navigational function of the vessel, and therefore, the concerns are not peculiar to maritime activity. Defendants' rationale revolves around the notion that the mast contact with the power line is not a maritime malfunction.

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[14] An analysis of the remaining two Cort factors is only necessary if the first two factors indicate a congressional intent to create the private remedy. Id. at 298.

[15] Defendants contend Boudloche v. Conoco Oil Corporation, 615 F.2d 687 (5th Cir. 1980), Delome v. Union Barge Line Co., 444 F.2d 225 (5th Cir. 1971), and Hastings v. Mann, 340 F.2d 910 (4th Cir. 1965), are controlling in that these cases illustrate that accidents which occur on the beach or in shallow water involving boats out of the water are not "on navigable water." Boudloche and Delome involved injuries occurring to individuals completely on land by vessels completely on land. The reach of the tides was not raised as a factor for either court to consider. The court has already discussed Hastings v. Mann and its inapplicability to the case at bar.

In *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1037 (1982), the Fourth Circuit found that plaintiffs, shipyard workers who worked with asbestos insulation materials in the construction and repair of numerous vessels, had a cause of action in admiralty against the manufacturers of the asbestos. *Id.* at 240. Because the asbestos insulation materials became an integral part of the ship, the court found their installation "clearly essential to the maritime industry." *Id.* at 239. The court reasoned that since these materials "were designed, advertised and marketed as *maritime* asbestos products," the *Executive Jet* criteria were met and admiralty jurisdiction existed. *Id.* at 240 [emphasis added]. The court established no requirement that the wrong relate to the navigational function of the vessel.

In *McCraine v. Hondo Boats, Inc.*, ____ La. ____ , 399 So. 2d 163 (La. 1981), *cert. denied*, 458 U.S. 1105, 102 S.Ct. 3483 (1982), the plaintiff was a passenger in a boat travelling in the intercoastal waterway when the boat accelerated and struck the wake of another vessel, causing her to be thrown to the deck and to slide against the exposed engine, thereby receiving serious burns. The court found plaintiff's claim to be cognizable in admiralty, even though the conduct complained of was negligence in construction or defective design of the engine which occurred ashore. *Id.* at 167. *See also, Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319 (5th Cir. 1980). The court reasoned that:

> [i]t cannot be argued that . . . [the law of admiralty] is not particularly well-suited for determinations as to proper design and construction of vessels meant to operate on navigable waters. It is clear that the federal interest in protecting navigation and commerce on navigable waters extends to considerations of the safe design and construction of all vessels, including pleasure boats used only for recreational, and not commercial purposes. The potential danger to navigation and commerce posed by improperly designed and manufactured vessels is apparent. *Id.*

Defendants attempt to distinguish *McCraine* by asserting that the hazard resulted from a design defect peculiar to navigation; that is, being thrown onto a hot engine by swells from a passing vessel. In light of the court's reasoning quoted above, however, *McCraine* cannot be so closely limited to its facts.

The case at bar involves an allegedly defective sailboat mast, an integral component of the vessel, and indeed one indispensable to its navigation. The defendants designed, manufactured, and marketed this uniquely maritime product; furthermore, the accident and resulting deaths occurred while the decedents were engaged in the traditional maritime activity of beaching the vessel. The instrumentality causing the deaths was an allegedly defectively designed sailboat mast. Unlike the case of a sailboat mast striking a power line while being towed on land, the requisite situs is present. As illustrated by both *White* and *McCraine*, the law of admiralty is concerned with the safe design and construction of vessels in navigation, particularly when the alleged defect is an integral part of the ship. Hence, "nexus" is present as well.[16] Accordingly, because the *Executive Jet* criteria have been met, the court finds that jurisdiction is present under 28 U.S.C. § 1333.[17] Defendants' motion to dismiss is hereby DENIED.

2. Strict Liability in Tort

In Count VIII of their complaints, plaintiffs allege that defendants Coast Catamaran and Coleman are strictly liable under § 402A of the Restatement (Second) of Torts for the wrongful deaths of the decedents. This matter is presently

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[16] This order does not address the question of the forseeability [sic] of the occurrence of such an accident, as it relates to plaintiffs' negligence cause of action in Count VI. Questions of foreseeability and proximate cause as they relate to the negligence cause of action would be addressed at trial.

[17] Once again, since the court finds that jurisdiction is present under 28 U.S.C. § 1333, it is not necessary to address whether jurisdiction also exists under the Extension of Admiralty Act, 46 U.S.C. § 740.

before the court on defendants' motion to dismiss this claim pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure. Defendants base their motion on the contention that the law of North Carolina is applicable in determining liability, and the courts of North Carolina do not recognize the doctrine of strict liability in tort.

In a recent opinion issued in the Charleston, South Carolina division of the United States District Court, Judge F.T. Dupree, Jr. of this court addressed the strict liability issue. *Tisdale v. Teleflex, Inc.*, Civil Action No. 82-1992-8 (February 20, 1985). In this opinion, the court noted that "*[b]oth* admiralty law and the law of the State of South Carolina recognize the doctrine of strict liability as enunciated in Restatement of Torts (2d) § 402-A." (p. 7). (emphasis added). The opinion further states that "the court is of the opinion that since the court's admiralty jurisdiction has been invoked, federal maritime law which has incorporated the doctrine of strict liability in tort controls." (p. 14). Although the court applied South Carolina law in its analysis, it did so for reasons of expedience, stating that the law of South Carolina is "nonbinding . . . where the court's admiralty jurisdiction has been invoked" (p. 23). Accordingly, assuming plaintiffs have a claim in strict liability (which would require plaintiffs to prove that the product was unreasonably dangerous), the court finds that the doctrine of strict liability is applicable to actions in admiralty, and defendants' motion to dismiss Count VIII of plaintiffs' complaints is DENIED.[18]

SO ORDERED.

This 18th day of April, 1985.

JAMES C. FOX
United States District Judge

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[18] For the benefit of the parties, a copy of Judge Dupree's opinion in Tisdale v. Teleflex, Inc. is appended to this memorandum of decision.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CHARLES R. HASSINGER, ADMINISTRATOR of the Estate of STANLEY H. HASSINGER, III,	]	
Plaintiff,	]	
v.	]	No. 83-1077-CIV-5
TIDELAND ELECTRIC MEMBERSHIP CORPORATION, COLEMAN COMPANY, INC., and COAST CATAMARAN CORPORATION,	]	
Defendants.	]	
JANET MEAD PROCTOR, Administratrix of the Estate of ROBERT DIEGO PROCTOR,	]	
Plaintiff,	]	
v.	]	No. 83-1078-CIV-5
TIDELAND ELECTRIC MEMBERSHIP CORPORATION, COLEMAN COMPANY, INC., and COAST CATAMARAN CORPORATION,	]	
Defendants.	]	

ORDER

Because the court is of the opinion that its order of April 19, 1985, "involves a controlling question of law as to which

there is substantial ground for difference of opinion," the court finds "that an immediate appeal from the order may materially advance the ultimate termination of this litigation." 28 U.S.C. § 1292(b). Specifically, the court refers to the admiralty jurisdiction issue. Accordingly, as provided in 28 U.S.C. § 1292(b), counsel have ten (10) days from the date of entry of this order in which to apply for an appeal to the Fourth Circuit Court of Appeals.

SO ORDERED.

This 9th day of May, 1985.

JAMES C. FOX
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-8031

Coast Catamaran Corporation and
Coleman Company, Inc.,

Petitioners,

versus

Charles R. Hassinger, Administrator
of the Estate of Stanley H. Hassinger, III;
Janet Mead Proctor, Administratrix of the
Estate of Robert Diego Proctor and
James B. Powell, Administrator of the
Estates of Stuart L. Powell,

Respondents.

No. 85-8032

Charles R. Hassinger, Administrator of
the Estate of Stanley H. Hassinger, III;
Janet Mead Proctor, Administratrix of
the Estate of Robert Diego Proctor and

James B. Powell, Administrator of the Estate of Stuart L. Powell,

Respondents,

versus

Tideland Electric Membership Corporation,

Petitioner,

and

Coleman Company, Inc. and Coast Catamaran Corporation,

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge

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Upon consideration of the petitions of Coast Catamaran Corporation and Coleman Company, Inc. and Tideland Electric Membership Corporation for permission to file interlocutory appeals and the answers to the petitions,

IT IS ORDERED that the petitions for permission to file interlocutory appeals under 28 U.S.C. §1292(b) are granted.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Russell and Judge Phillips.

FILED
July 9, 1985
U.S. Court of Appeals
Fourth Circuit

For the Court
JOHN M. GREACEN
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1672

Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger, III; Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor and James B. Powell, Administrator of the Estate of Stuart L. Powell,

Appellees,

versus

Tideland Electric Membership Corporation,

Defendant,

and

Coleman Company, Inc. and Coast Catamaran Corporation,

Appellants.

No. 85-1673

Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger, III; Janet Meade Proctor, Administratrix of the Estate of Robert Diego Proctor and

James B. Powell, Administrator of the Estate of Stuart L. Powell,

Appellees,

versus

Tideland Electric Membership Corporation,

Appellant,

and

Coleman Company, Inc. and Coast Catamaran Corporation,

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (C/A 83-1077, 1078, 84-256)

Argued: October 10, 1985 Decided: January 8, 1986

Before PHILLIPS and ERVIN, Circuit Judges, and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

Robert M. Hughes, III (Glen A. Huff; Seawell, Dalton, Hughes & Timms on brief); Arthur W. O'Connor, Jr. (George R. Rags-

dale (Moore, Ragsdale, Liggett, Ray & Foley, P.A.; Armistead J. Maupin; John Turner Williamson; Maupin, Taylor & Ellis, P.A. on brief) for Appellant; Vance Barron, Jr. (McNeill Smith; Smith, Moore, Smith, Schell & Hunter; Daniel L. Brawley; Marshall, Williams, Gorham & Brawley; W. Timothy Haithcock; Barnes, Braswell & Haithcock, P.A. on brief) for Appellees.

McMillan, District Judge:

Defendants Tideland Electric Membership Corporation (Tideland), Coleman Company, Inc. (Coleman) and Coast Catamaran Corporation (Catamaran) appeal the denial by the district court of their motions to dismiss this action for lack of admiralty jurisdiction. They argue that the district court erred when it held (1) that admiralty jurisdiction does not stop at the water's edge but goes to the mean high water mark; (2) that the "extension of land" doctrine, which can operate to deny admiralty jurisdiction, does not apply here; and (3) that there was a significant relationship or "nexus" between the alleged wrongs of each appellant and traditional maritime activity.

We AFFIRM.

I. Background

The testimony and other evidence will support the following findings:

On June 5, 1982, Stanley H. Hassinger, III, Robert Diego Proctor, Stuart L. Powell, and Rex King sailed two eighteen-foot Hobie Cat sailboats across Pamlico Sound to Silver Lake in Ocracoke, North Carolina. At about 1:00 p.m., they decided to beach their boats. It is unclear whether all four participated in beaching the Hassinger boat or whether Powell stayed with the other boat and only came over when he saw

his friends in trouble (compare King Deposition, A-65, to Fulcher Deposition, A-332). In the process of beaching the Hassinger boat, the mast hit an energized, uninsulated power line carrying 7,200 volts of electricity. King was thrown clear and survived. Hassinger, Powell, and Proctor were electrocuted.

Administrators for the three decedents brought these actions against Tideland, the owner and operator of the power line, and against Catamaran and Coleman, the alleged designers, manufacturers and sellers of the Hassinger sailboat. Jurisdiction over Tideland, Catamaran, and Coleman was based in part on admiralty pursuant to 28 U.S.C. §1333 and 46 U.S.C. §740. Plaintiffs also alleged that the court had federal question jurisdiction pursuant to 28 U.S.C. §1331 over Tideland and diversity jurisdiction pursuant to 28 U.S.C. §1332 over Coleman and Catamaran. The court later dismissed the federal question claims against Tideland (A-481 to 483).

Tideland filed a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction (A-101). Coleman and Catamaran filed a motion to dismiss the application of admiralty law to them. All parties filed affidavits and depositions with the district court on the issue of the location of the boat, the decedents, and the power line relative to the water at the time of the accident.

The district court found that it did have jurisdiction in admiralty (A-471 to 488). Nevertheless, it certified for interlocutory appeal "the admiralty jurisdiction issue" (A-492).

II. Admiralty Jurisdiction

Article III, Section 2 of the United States Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction." In 28 U.S.C. §1333 Congress gave the district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction. . . ." And in 46 U.S.C. §740, Congress extended the admiralty and maritime jurisdiction of the United States to include "all cases of damage or injury, to person or prop-

erty, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

The Supreme Court has held, however, that for admiralty jurisdiction to exist in the federal courts the alleged wrong must (1) occur "on or over navigable waters" and (2) "bear a significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972). These two requirements are known respectively as the "situs" and the "nexus" requirements. The appellants challenge the district court's findings as to both. We will consider the "situs" issue first.

A. Situs

The situs requirement is satisfied if the boat or ship is partly in or over the water. *See, e.g., Blanchard v. American Commercial Barge Line Co.*, 343 F.Supp. 920 (M.D. La. 1972), *aff'd* 468 F.2d 950 (1972); *Mayer Boat Works, Inc. v. Bright Marine Basin, Inc.*, 265 F.Supp. 352 (E.D.N.Y. 1966).

There was some evidence that the boat was not in the water. Deputy Carl Teeter stated that he took a photograph (EA-3) of the boat about thirty minutes after the accident and that the boat had not been moved since the accident (A-436, 437). The photograph shows the boat out of the water. Rex King, the lone survivor of the accident, stated that the boat was on land when it hit the power line (A-95) and that the photograph (EA-3) accurately represented its position (A-76). Murray Fulcher, the proprietor of a nearby store, thought, but was not absolutely sure, that the boat was not in the water when it hit the power line (A-384, 385). And Ronald O'Neal, an employee of appellant Tideland, without stating when he arrived at the scene, said that the boat "was entirely on dry land . . ." (A-170).

The apparently greater weight of evidence, however, supports the conclusion that a substantial part of the Hassinger boat was in or over the water. According to James

Strickland, the "sailboat was half in and half out of the water" (A-153). Irving Garish stated that "as far as I can recall about half of the boat was in the water" (A-158). James Henning stated that "about half the sailboat was in the water and about half of it was on the beach, as far as I can remember" (A-223). Bill Burk said that "the boat was half in and half out of the water" (A-119), and Judy Lineberger stated that "over half of the sailboat was in the water" (A-144).

Phil Hoft arrived at the scene in another boat seven to eight minutes after the accident. Hoft stated in an affidavit that "about three feet of the stern of the Hassinger sailboat was still in the water" (A-114). In his deposition, he said that the "sterr. quarter portion of the boat was in the water" (A-282). Terry Deakle, who was sailing in the boat with Hoft, stated in an affidavit that "approximately one-half of the stern of the Hassinger sailboat was in the water" (A-127). Both Hoft and Deakle stated that the photograph taken by Deputy Carl Teeter (EA-3) was *not* an accurate representation of the accident because it showed the boat fully out of the water (A-282, A-301).

Robert Shafer and Richard Payne were sailing behind Hoft and Deakle and arrived soon after them (A-135, A-149). Shafer stated that Hassinger's boat was "about half in the water and about half on the beach" (A-136). Payne stated that "the stern of the Hassinger sailboat was about two or two and one-half feet into the water, and the rudders were elevated to the rear of the stern out over the water" (A-150).

Russell Newell said that "the stern of the boat was in the water. . . . About half the boat was in the water" (A-133). Milford Loebsack stated that "the stern extended two or three feet from the beach into the water" (A-147). Tom Beach said, "the rudder of the boat was still in the water' (A-156, A-316). Clifford Helig said, "I distinctly recall that the rudders and about a one-foot length of the stern were in the water" (A-220).

Philip Sawyer said, "about one-third of the boat, the stern and rudders, was in the water" (A-227). John Perry said

that the "rear one-third of the sailboat . . . was in the water" (A-458). According to Robert Barnhardt, "the stern portion of the boat was in the water" (A-461).

The district court did not make a finding as to whether the boat was in the water or out of the water at the time of the electrocutions. He simply found that the boat was below the mean high water mark, and held as a matter of law that "navigable water" extends to the mean high water mark. The appellants do not challenge the court's finding that the boat was below the mean high water mark. They strenuously argue, however, that the district court's legal conclusion was incorrect; that "navigable water" and therefore admiralty jurisdiction extends only to the water's *edge* at any given time. They base this argument on an ancient English case known as *Sir Henry Constable's Case* which is summarized by Mr. Justice Storey in *DeLovio v. Boit*, 7 F.Cas. 418 (D.C.D. Mass. 1815) (No. 3776):

> "On the other hand, in Sir Henry Constable's Case, 5 Coke, 106, etc., it was expressly adjudged, as has been already stated, that the soil, on which the sea ebbs and flows, may be parcel of a manor, and that, when the sea flows and has plenitudinem maris, the admiral shall have jurisdiction of every thing done on the water, between the high and low water mark, by the ordinary and natural course of the sea; and yet, when the sea ebbs, the land may belong to a subject, and every thing done on the land, when the sea is ebbed, shall be tried at common law, for it is then parcel of the country, and infra corpus comitatus; and so, between the high and low water mark, the common law and the admiralty have divisum imperium . . . Until some strong reason can be assigned for a distinction, it would seem more conformable to law and nature to hold, that the bodies of counties, bounding on navigable waters, are limited at all times by the line of the sea tide; and this is the doctrine asserted by the admiralty."

Id. at 428.

A brief look at a few American cases shows that the alleged rule of *Sir Henry Constable's Case* does not exist here.

The principal case is *The Steamship Jefferson*, 215 U.S. 130 (1909). There, the Supreme Court held that admiralty jurisdiction applied to a ship in dry dock. To reach this result, the Court first found that a vessel moored to a wharf from which the tide had fully receded "would not cease to be a subject within the admiralty jurisdiction merely, because for a short period by operation of nature's laws, water did not flow about her." *Id.* at 142. Because a vessel at a dry wharf was still subject to admiralty jurisdiction, a vessel in a dry dock was too.

The Steamship Jefferson was not a departure from prior American law. Indeed, in *Dailey v. City of New York*, 128 F. 796 (S.D.N.Y. 1904), the district court held that the owner of a scow could sue in admiralty for damages to his vessel that occurred *after* the tide had receded. In that case, five scows had entered at high tide a semi-enclosed area in the East River. When the tide receded, four scows came to rest safely on the earth but one settled on a hump and was damaged. The owner of the damaged scow sued the city in admiralty. The court held that even though the tide had receded at the time of the damage, the area was "navigable water" and admiralty jurisdiction existed.

The modern case of *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3rd Cir. 1974), *cert. denied* 420 U.S. 927 (1975), also sheds light on the meaning of the term "navigable water." In that case, the United States sued to enjoin a developer from developing an area that had been tidal marsh until 1927. One issue in the case was whether the River and Harbors Appropriation Act of 1899 (which prohibited the discharge of any refuse matter into "navigable water" without permission of the Secretary of the Army, 33 U.S.C. § 407), covered tidelands. The court first found that Congress intended that the term "navigable water" in the Act have the same meaning it had in admiralty at the time the Act was passed. *Stoeco*, 498 F.2d at 609. The court then held that the admiralty def-

inition of "navigable water" in tidal areas included all areas within the "ebb and flow of the tide" and was not limited to "areas of actual or reasonably potential navigability," *Id.* at 610.

No cases or statutes since the turn of the century appear to have restricted the scope of the term "navigable water." Admiralty jurisdiction in America therefore extends to all areas within the ebb and flow of the tide, regardless of whether those areas are actually covered by water at the time of the alleged event. And the best determination of "the land which is actually covered by the tides most of the time" is the mean high water mark. *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 26 (1935); *see also Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978), where the Court observed, 578 F.2d at 750, that after *Borax,* "the test of the mean high water mark became the inveterate standard to be applied in limiting federal authority over navigable waters."

It follows that "navigable water" and thus the boundary of admiralty jurisdiction in tidal areas does not ebb and flow with the tide but extends to the mean high water mark at all times, because "[w]hether, at the time the injury was sustained, [libellant] . . . was landward or seaward of the actual edge of the water, his rights should be the same, and they should be determinable in the same court." *Hastings v. Mann,* 340 F.2d 910, 912 (4th Cir. 1965), *cert. denied* 380 U.S. 963.

This holding alone does not, however, completely settle the situs issue. Appellants further argue that even if the shoreward boundary of admiralty jurisdiction in tidal areas is the mean high water mark, admiralty jurisdiction should not exist in this case because the decedents were standing on "extensions of land" (the beach or the bottom of the lake) when the accident occurred.

The extension of land doctrine prevents recovery in admiralty for damages to "piers, docks, wharves and similar *structures* extending over navigable waters" and for "personal injuries suffered by persons while upon such *structures* . . .

unless . . . caused by a vessel on navigable waters." *Hastings v. Mann, supra,* at 911 (emphasis added). The doctrine does not apply here because no structure was involved and because the harm was caused by a vessel on "navigable water."

Because the admiralty definition of "navigable water" in tidal areas includes the area up to the mean high water mark, and because the "extension of land" doctrine does not apply in this case, the district court correctly found that the situs requirement of *Executive Jet* was satisfied.

B. Nexus

To meet the nexus requirement of *Executive Jet,* the alleged wrong must bear a "significant relationship to traditional maritime activity." 409 U.S. at 268. The alleged wrongs of Tideland in this case are essentially that it negligently placed an unreasonably low, uninsulated power line over the "navigable water" of Silver Lake, North Carolina, and that it placed no warning signs, signals, or buoys on or around the power line to alert sailors to the danger (A-27 to 30, A-237 to 242). The alleged wrongs of Coleman and Catamaran are mainly that they negligently designed, manufactured and sold a catamaran with an all metal, uninsulated mast, that they failed to put non-metal parts on the boat with which it could be handled, and that they failed to warn of the danger of electrocution if the mast of the boat touched a power line (A-33 to 37, A-242 to 245).

Four factors should be considered in determining whether the alleged wrongs satisfy the nexus test of *Executive Jet:*

(1) the functions and roles of the parties;

(2) the type of vehicles and instrumentalities involved;

(3) the causation and type of injury; and

(4) traditional concepts of the role of admiralty law. *Oman v. Johns-Manville Corp.,* 764 F.2d 224, 230 (4th Cir. 1985); *see*

also Kelly v. Smith, 485 F.2d 520, 526 (5th Cir. 1973), *cert. denied* 416 U.S. 969 (1974).

The district court properly considered these four factors in finding that the alleged wrongs of appellant Tideland met the nexus requirement. It stated:

> The role of the decedents at the time of the accident was that of a sailor attempting to remove a vessel from navigation; defendant's role was that of owner and operator of a power line, which proved to be a dangerous impediment to this navigational function. The instrumentalities involved are clearly the mast of the vessel and the overhead electric power line; the contact between these instrumentalities resulted in decedents' deaths by electrocution. The act complained of with respect to defendant Tideland is the negligent placing of a dangerous impediment — a power line — to navigation. Assuming navigation (as the court finds exists herein), "[s]uch activity . . . [is] considered as having a significant relationship to traditional maritime activity within the meaning of *Executive Jet*."
>
> Admiralty law traditionally has concerned itself with the protection of sailors from injury or death caused by obstructions to navigation — this concern is the basis of the court's decision herein

(A-479).

The district court's finding is not "clearly erroneous" and therefore should be upheld. *See Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 732 (11th Cir. 1982).

Tideland argues that the district court erred in finding that the power line was an obstruction to navigation. However, the district court's conclusion that, at the time and place of the accident, the power line was seaward of the mean high water mark is supported by substantial evidence (*see* Shafer

Affidavit, A-136; Shafer Deposition, A-181 to 182; Burks Affidavit, A-119; Smith Affidavit and Photograph, A-139 and EA-3) and controverted by none. Because, among other things, the power line passed over "navigable water" and was a potential obstruction to navigation, admiralty jurisdiction existed.

As to appellants Catamaran and Coleman, the *four factor* nexus requirement is also satisfied:

First, Catamaran's and Coleman's roles at the time of the accident were those of manufacturer, marketer, supplier, and seller of catamarans. Hassinger Complaint ¶8 (A-23), Powell Complaint ¶6 (A-231).

Second, such vehicles are obviously maritime.

Third, the injury was caused by an allegedly defective mast which, to paraphrase *Oman, supra,* at 229, allowed electricity to spread through the vessel and electrocute three persons.

Fourth, one of the purposes of admiralty law is to protect sailors from defective equipment while they are engaged in maritime activity. *See, e.g., Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *accord Oman v. Johns-Manville Corp., supra,* at 229; *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 10-11 (1st Cir. 1983).

The wrongs of Coleman and Catamaran, as alleged, therefore satisfy the nexus test of *Executive Jet.*

III.

The district court correctly held that admiralty jurisdiction extends at all times in tidal areas to the mean high water mark. Its unchallenged findings that the decedents, the mast and a substantial portion of the sailboat, and the power line were below the mean high water mark are fully supported by the evidence. The court's finding that the alleged wrongs

of Tideland satisfied the nexus requirement of *Executive Jet* is not clearly erroneous. As to appellants Catamaran and Coleman, although the district court may not have used a formal analysis in finding that their alleged wrongs satisfied the nexus requirement of *Executive Jet*, nevertheless, a review of the four factors of *Oman* shows that in fact the nexus requirement is met also as to them.

The decision of the district court is therefore AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1672

Charles R. Hassinger, etc., et al,

Appellees,

versus

Tideland Electric Membership Corporation,

Defendant,

and

Coleman Company, Inc., et al,

Appellants.

No. 85-1673

Charles R. Hassinger, etc., et al,

Appellees,

versus

Tideland Electric Membership Corporation,

Appellant,

and

Coleman Company, Inc., et al,

Defendants.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge McMillan, United States District Judge, sitting by designation.

FILED
Feb. 6, 1986
U.S. Court of Appeals
Fourth Circuit

For the Court,
JOHN M. GREACEN
Clerk

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1659
No. 85-1786

In The
Supreme Court of the United States
October Term, 1985

COAST CATAMARAN CORPORATION, *et al.*,
Petitioners,

v.

CHARLES R. HASSINGER, *et al.*,
Respondents.

TIDELAND ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,

v.

CHARLES R. HASSINGER, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS HASSINGER, PROCTOR, AND POWELL IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the mean high water line the boundary of navigable waters for the determination of admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740?

2. Is the beaching of a sailboat in navigable waters a traditional maritime activity pertinent to the determination of admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740?

3. Does the wrongful death of sailors in navigable waters caused by a defective sailboat mast bear a sufficient relationship to traditional maritime activity to require the application of admiralty law in a diversity action brought under 28 U.S.C. § 1332 and the "saving to suitors" clause of 28 U.S.C. § 1333(1)?

PARTIES TO THE PROCEEDING

The petitioners in case no. 85-1659 are Coast Catamaran Corporation and The Coleman Company, Inc. The respondents are Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III; Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor; James B. Powell, Administrator of the Estate of Stuart L. Powell; and Tideland Electric Membership Corporation.

The petitioner in case no. 85-1786 is Tideland Electric Membership Corporation. The respondents are Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III; Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor; James B. Powell, Administrator of the Estate of Stuart L. Powell; Coast Catamaran Corporation; and the Coleman Company, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 781 F.2d 1022. The memorandum decision of the United States District Court for the Eastern District of North Carolina is reported at 627 F. Supp. 65.[1] The opinions are also reprinted as appendices to the Petition of Coast Catamaran.

———o———

JURISDICTION

The Respondents suggest that the Petition of The Coleman Company, Inc., is moot and does not present a case or controversy for consideration by this Court. Coleman was dismissed from these actions by the United States District Court for the Eastern District of North Carolina in an order of summary judgment dated October 31, 1985, reported at 622 F. Supp. 146 (E.D.N.C. 1985). The Respondents are not contesting that dismissal.

———o———

STATUTES INVOLVED

28 U.S.C. § 1333. Admiralty, Maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

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[1]The memorandum decision of the District Court in the Hassinger and Proctor cases was applied to the Powell case in an order dated May 29, 1985.

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

———o———

STATEMENT OF THE CASE[2]

Three sailors were electrocuted as they were beaching a sailboat in tidal waters in Silver Lake harbor at Ocracoke Island, North Carolina, on June 5, 1982. They were nearing the end of a thirty-mile voyage across Pamlico Sound from the mainland of North Carolina. 627 F. Supp. at 68. The top of the mast of the sailboat struck an uninsulated and unmarked overhead power line of Tideland Electric Membership Corporation located seaward of the mean high water line. The sailors were also seaward of the mean high water line at the time of their deaths. 781 F.2d at 1028.

Silver Lake is the harbor of Ocracoke Island and is connected by a navigable channel to Pamlico Sound and thence to the Atlantic Ocean. It is a tidal body of water subject to the ebb and flow of the tide. Its waters are used for commercial purposes by ferry boats and fishing boats. 627 F. Supp. at 68.

The Hobie Cat sailboat was a recreational sailboat designed and manufactured by Coast Catamaran. The mast and rigging of the sailboat were conductive to electricity and contained no insulating materials to protect sailors from death or injury from contact with overhead power lines. The sailboat was designed, advertised, and sold as a boat suitable for launching and retrieving directly off a beach.

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[2]The Respondents incorporate by reference all the findings in the Fourth Circuit and District Court opinions reported at 781 F.2d 1022 and at 627 F.Supp. 65.

The Respondents are the personal representatives of the estates of the deceased sailors. They are residents of North Carolina. These wrongful death actions were brought against Tideland, a North Carolina corporation, for negligence in the maintnance of the low overhead power line, which was unreasonably dangerous to the launching and beaching of sailboats and which was an obtruction to navigation. The Respondents also alleged that Coast Catamaran, a California corporation, was liable for a dangerously defective design and for failure to give adequate warning of the electrocution hazard. Although the boats were intended to be used for launching and beaching in areas where there were significant hazards of contact with overhead power lines and although there had been multiple deaths and injuries to sailors using Coast Catamaran's boats, the mast and rigging failed to incorporate insulating materials to protect sailors from death or injury from such hazards.

The Respondents invoked admiralty jurisdiction, 28 U.S.C. § 1333 and 46 U.S.C. § 740, against Tideland. The Respondents invoked diversity jurisdiction, 28 U.S.C. § 1332, against Coast Catamaran and sought to apply admiralty law pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333(1).

Tideland moved to dismiss the complaint for lack of subject matter jurisdiction. Coast Catamaran moved for partial summary judgment to obtain a pre-trial ruling that state law rather than admiralty law applied to the Respondents' cases.

The District Court denied the motions and certified its decision for interlocutory appeal to the Fourth Circuit.

The Fourth Circuit's decision was rendered on January 8, 1986. 781 F.2d 1022. The trial commenced in the District Court on January 13, 1986. The jury returned its verdict against the Tideland and Coast Catamaran on February 21, 1986.

In answer to specific issues, the jury found that Tideland had violated statutes regulating matters pertaining to navigation and that the violations were a contributing cause to the collision between the sailboat mast and the power line. Tideland was also held to be negligent in the design, construction, inspection, and maintenance of the power line. Coast Catamaran was held to be negligent in the design and manufacture of a sailboat reasonably safe for its intended use. The jury also found Coast Catamaran strictly liable under § 402A of the *Restatment (Second) of Torts.* The deceased sailors were held to have been partially at fault, and the damage awards were reduced accordingly.

A judgment against Tideland and Coast Catamaran was entered on February 24, 1986. Tideland and Coast Catamaran filed motions for judgment notwithstanding the verdict. On April 11, the District Court entered an order denying the motions for judgment notwithstanding the verdict. An amended judgment was entered on April 11. On May 9, Tideland filed written notice of appeal. Coast Catamaran filed notice of appeal on May 21. Neither Petitioner has requested a new trial below. The only issues they raise on the post-trial appeal to the Fourth Circuit relate to prejudgment interest and joint and several liability. No errors have been assigned as to the issues submitted to the jury, as to the sufficiency of the evidence, or as to the adequacy of the District Court's instructions to the jury.

Thus, the Petitions of Coast Catamaran and Tideland seek review by this Court of an interlocutory decision of the Fourth Circuit in a case that has subsequently been heard in a six-week trial before a jury on the merits.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The respondents Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III, Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor, and James B. Powell, Administrator of the Estate of Stuart L. Powell ("Respondents") respectfully request that this Court deny the petitions for writ of certiorari seeking review of the opinion of the Court of Appeals for the Fourth Circuit in this case. The Fourth Circuit opinion is reported at 781 F.2d 1022 (4th Cir. 1986). The opinion of the District Court is reported at 627 F. Supp. 65 (E.D.N.C. 1985).

A. The Mean High Water Line is the Boundary of Navigable Waters Under the Admiralty Jurisdictional Statutes, 28 U.S.C. § 1333 and 46 U.S.C. § 740.

The Respondents contend that the Fourth Circuit was correct in ruling that the boundary of navigable waters in tidal waters is the mean high water line. Coast Catamaran implicitly agrees, for it does not raise any issue as to admiralty situs in its Petition. Tideland is the only Petitioner to raise any question as to admiralty situs.

The issue is whether the boundary of "navigable waters" that determines admiralty situs should be an ephem-

eral, fluctuating boundary or a predictable, fixed boundary. The Fourth Circuit and the District Court rejected Tideland's contention that admiralty jurisdiction should ebb and flow with the tide. In doing so, they followed the unanimous federal precedent that looks to the mean high water line in all similar questions of federal authority.

In *Willink v. United States,* 240 U.S. 572 (1916), this Court acknowledged the mean high water line as the boundary in tidal waters of the public right of navigation and the federal navigational servitude. The mean high water line was also chosen as the legal boundary of tidal lands in *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935). The mean high water line has become "the inveterate standard to be applied in limiting federal authority over navigable waters." *United States v. Holland,* 373 F. Supp. 665, 671 (M.D. Fla. 1974).

Tideland's Petition merely hints at a constitutional issue as to the scope of admiralty situs in this case, but Tideland neither cites nor discusses any cases to support the suggestion.

The water's edge has never been a boundary of constitutional significance in admiralty. Four examples may be cited to prove the truth of this assertion. First, the Extension of Admiralty Act, 46 U.S.C. § 740, expressly extended admiralty jurisdiction to injuries or damage "done or consummated on land" caused by "a vessel on navigable water." The Ninth Circuit held the Act to be a constitutional exercise of the power of Congress to give jurisdictional authority to the lower federal courts under article III, section 1, of the Constitution. *United States v. Matson Navigation Co.,* 201 F.2d 610 (9th Cir. 1953).

Second, the Longshoremen's and Harbor Workers' Compensation Act extended coverage under 33 U.S.C. § 903(a) for injuries to harbor workers and longshoremen on "navigable waters of the United States." That phrase was defined to include wharfs, dry docks, piers, terminals, marine railways, and other appurtenances of land. The constitutionality of the Act under article III, section 1, was upheld by the Fourth Circuit in *Newport News Ship Building and Dry Dock Co. v. Graham,* 573 F.2d 167 (4th Cir. 1978), *cert. denied,* 439 U.S. 979 (1978), and by the Third Circuit in *Dravo Corp. v. Maxin,* 545 F.2d 374 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

Third, this Court has also held that the Jones Act, 46 U.S.C. § 688, created substantive maritime rights for injuries on "land" beyond the water's edge. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943). And fourth, in the same case this Court acknowledged that the ancient admiralty remedy of seamen for maintenance and cure applied to injuries incurred on land. 318 U.S. at 41-42.

Thus, the only real question as to admiralty situs raised by Tideland's Petition is whether the jurisdictional statutes, 28 U.S.C. § 1333 and 46 U.S.C. § 740, were correctly applied by the Fourth Circuit.

It is arguable that the statutory grant of admiralty jurisdiction in 28 U.S.C. § 1333 should be given its full constitutional scope, since the statute uses the constitutional phrase "admiralty or maritime jurisdiction." *Ex parte Easton,* 95 U.S. 68 (1877). Mr. Justice Holmes alluded to such a broad interpretation of the statute when he said, "But Congress cannot enlarge the constitutional grant of

power, and therefore if it could permit a libel to be maintained, one can be maintained now." *The Blackheath,* 195 U.S. 361, 365 (1904). However, the decision of the Fourth Circuit in the present case did not require stretching 28 U.S.C. § 1333 to its constitutional limits. The most restrictive interpretation of the locality requirement, *The Plymouth,* 70 U.S. (3 Wall.) 20 (1865), required only that the cause of action be completed "on navigable waters." 70 U.S. (3 Wall.) at 36. The holding of the Fourth Circuit is that "navigable waters" include all areas seaward of the mean high water line, regardless of the state of the tide at the moment of injury.

As a matter of statutory construction, the Fourth Circuit's definition of "navigable waters" is consistent with all other federal cases and statutes which have addressed the scope of federal authority over navigable waters. For example, the Rivers and Harbors Act, 33 U.S.C. § 403, extends the jurisdiction of the Army Corps of Engineers to navigable waters of the United States. The Act has been uniformly interpreted to extend to the mean high water line in tidal waters. *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *United States v. Stoeco Homes, Inc.,* 498 F.2d 597 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

As a further example, Congress used the "line of mean high tide" to define the extent of "lands beneath navigable waters" in tidal areas in the Submerged Lands Act, 43 U.S.C. § 1301(a). The same definition was incorporated by reference in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a).

The case cited by Tideland, *Boudlouche v. Conoco Oil Corp.*, 615 F.2d 687 (5th Cir. 1980), is not in point. The pertinent fact in that case was that the boat in question "was completely removed from the water" when it fell from a crane and came to rest "landward" when it dropped. 615 F.2d at 687-88. The court's ruling was based on the fact that the vessel was entirely ashore, and there was no necessity of determining the boundary of navigable waters as in the present case.

Tideland cites no decisions for the argument that receding of tidal waters below the mean high water line would divest an admiralty court of jurisdiction. The research of the Respondents has located no such cases. To the contrary, in *The Steamship Jefferson*, 215 U.S. 130 (1909), this Court held that a vessel that was in a dry dock from which the water had been removed was within the admiralty jurisdiction and subject to a salvage claim. This Court said:

> In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land.
>
> 215 U.S. at 142.

Accord, Dailey v. City of New York, 128 F. 796, 798 (S.D.N.Y. 1904).

Robert M. Hughes, in his *Handbook of Admiralty Law* (2d ed. 1920), also recognized that the shoreward

limit of admiralty jurisdiction should be determined by the usual state of the waters, not the state of the waters at a particular time, when he said that jurisdiction is not removed by a low tide:

> The admiralty jurisdiction in matters of tort exists over all navigable waters, as explained in a previous connection. This includes canals. But it includes only navigable waters in their usual state. *For instance, a stream that is navigable at ordinary tides is none the less within the jurisdiction because it happens to be bare at an unusually low tide;* and, conversely, when a navigable river is widened by freshets far beyond its usual banks and overspreads the adjoining country on either side, it does not carry admiralty jurisdiction with it. Hence, in the Arkansas, a steamer which, during a flood, was far out of the regular channel, and collided with a house, which was usually inland, was held to have committed no marine tort.
>
> R. Hughes, *Handbook of Admiralty Law* (2d ed. 1920) at 195-96 (emphasis added).

Tideland argues, perhaps facetiously, that the mean high water line is an "imaginary" line. (Petition at p. 6.) Rather, it is a predictable, scientific boundary that can be determined by survey. It is the best measure of "the land which is actually covered by the tides most of the time," *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 26 (1935), and therefore is the best measure of the usual state of the waters.

It has been held that there is no expansion of admiralty jurisdiction beyond the ordinary high water mark when the waters flood. *The Arkansas,* 17 F. 383 (S.D. Iowa 1883). It would be inappropriate to apply a different rule and contract the admiralty jurisdiction when the waters ebb. The Fourth Circuit was correct when it held that the

admiralty jurisdiction extends to mean high water line at all times.

Thus, Tideland has failed to show any conflict in federal decisions or any error in the rule of situs approved by the Fourth Circuit. To the contrary, the Fourth Circuit has followed the overwhelming weight of federal authority, and there is no substantial reason for this Court to address a question of admiralty situs that is in harmony with all significant cases and statutes.

B. The Beaching of a Sailboat is a Traditional Maritime Activity.

The Fourth Circuit correctly approved the finding of the District Court that the sailboat was still engaged in traditional maritime activity and had not been removed from navigation as it was being beached. The District Court said (627 F. Supp. at 71):

> First, the act of beaching a vessel does constitute traditional maritime activity. Historically, and even today, vessels are pulled up on the beach with regularity. This act is an ancient and practical solution to the problem of removing the boat from the reach of the tides. As discussed previously, until a vessel is so removed, it remains in navigation.

Boats designed for beaching are not modern inventions. "Throughout Greco-Roman antiquity, the craft that tramped from coastal town to coastal town or between small islands often loaded and unloaded off beaches without benefit of harbor installations of any kind; there is every reason to think Bronze Age cargo carriers did the same." L. Casson, *Ships and Seamanship in the Ancient World* (Princeton 1971) at 361-62.

This Court has taken a similar view when it held that a vessel moored to the dock at the end of a journey did not become part of the land and was still in navigation so that an injury occurring on board the vessel was within admiralty jurisdiction. *Leathers v. Blessing*, 105 U.S. 626 (1881). The Court said:

> Although a suit might have been brought in a common law court for the cause of action sued on here, the district court, sitting in admiralty, had jurisdiction of this suit. The vessel was waterborne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf and that she had communication with the shore by a gang-plank, did not make her part of the land or deprive her of the character of a waterborne vessel.

105 U.S. at 629.

The Hobie Cat sailboat was specifically designed to be launched and beached on the shore. It was therefore being used in a normal and appropriate fashion as the three sailors were attempting to drag it beyond the reach of the tide. There is no dispute about the findings of the District Court that the boat had not been removed beyond the mean high water line when it struck the overhead power line of Tideland Electric Membership Corporation and caused the deaths of the sailors. 781 F.2d at 1028. The District Court found that the power line was an obstruction to navigation, 627 F. Supp. at 71-72, and the Fourth Circuit agreed, 781 F.2d at 1027-28.

The grounding or beaching of boats is a subject of maritime concern in the Inland Rules. The Rules apply to vessels of any type on inland navigable waters of the United States. Rules 1(a) and 3(a), 33 U.S.C. §§ 2001(a) and 2003(a); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). Furthermore, a vessel need not be "underway" as defined in Rule 3(h), 33 U.S.C. § 2003(h), nor must it be afloat on the water to be governed by the Rules. The Rules require vessels that are "aground" in navigable waters to exhibit certain lights and shapes, although small vessels of less than twelve meters are exempt from that requirement.[3] Rule 30(d) and (f), 33 U.S.C. § 2030(d) and (f).

Since navigable waters are often subject to the ebb and flow of the tide, to subsidence from drought, or to the shifting of sandbars, the rules of navigation must necessarily encompass vessels that have been temporarily "stranded" on navigable waters, whether by intent or circumstance. Although the Respondents do not contend that any of the Inland Rules apply to the deaths in question, it is clear that the grounding or beaching of boats below the mean high water line is a traditional subject of maritime concern.

Thus, Tideland has failed to show any conflict in federal decisions or any error by the Fourth Circuit in the analysis of admiralty nexus required by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

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[3]The Hobie Cat sailboat in this case was approximately eighteen feet long, less than six meters.

C. The Wrongful Death of Sailors in Navigable Waters Caused by a Defective Sailboat Mast is a Proper Subject of Admiralty Jurisdiction.

A fair statement of the wrong alleged by the Respondents is that the sailors were wrongfully killed in navigable waters by a negligently designed, dangerously defective sailboat mast which was unreasonably dangerous when used for its intended purposes, including launching, beaching, and sailing in navigable waters. Coast Catamaran's argument is based on its own narrow definition of the "wrong." Coast Catamaran says, "The wrong charged was a failure to eliminate the conductivity of the aluminum mast of a Hobie Cat sailboat." (Petition at p. 7.)

The Fourth Circuit applied the four-factor analysis of admiralty nexus which was first utilized in *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974). The same analysis had been previously adopted by the Fourth Circuit in *Oman v. Johns-Manville Corporation,* 764 F.2d 224 (4th Cir. 1985), *cert. denied,* — U.S. —, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985).[4] The Fourth Circuit found that Coast Catamaran was a manufacturer, marketer, supplier, and seller of catamaran sailboats; that

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[4]The four-factor analysis of the Fifth Circuit in *Kelly v. Smith* has achieved wide-spread acceptance among the other Courts of Appeals. *E.g., Drake v. Raymark Industries, Inc.,* 772 F.2d 1007, 1015 (1st Cir. 1985), *cert. denied,* — U.S. — (May 19, 1986); *Edynak v. Atlantic Shipping, Inc.,* 562 F.2d 215, 221 (3d Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *St. Hilaire Moye v. Henderson,* 496 F.2d 973, 978-79 (8th Cir. 1974), *cert. denied,* 419 U.S. 884 (1974); *Solano v. Beilby,* 761 F.2d 1369, 1371 (9th Cir. 1985); *Harville v. Johns-Manville Products Corp.,* 731 F.2d 775 (11th Cir. 1984). There is no conflict among the circuits as to whether this four-factor analysis is appropriate.

the vehicles were "obviously maritime;" that the injuries were caused by an allegedly defective mast; and that the purpose of admiralty law was to protect sailors from defective equipment while engaged in maritime activity. 781 F.2d at 1028. The Fourth Circuit also approved the finding of the District Court that the sailors were engaged in an act of traditional maritime activity as they were beaching the sailboat in navigable waters. 781 F.2d at 1027-28.

Coast Catamaran argues that because one may be electrocuted on land by use of an aluminum ladder, electrocution in navigable waters by a sailboat mast is not an injury of maritime concern. (Petition at p. 9.) By Coast Catamaran's reasoning, the fact that one might drown in a swimming pool because of a defective life vest would mean that a sailor who drowned at sea for a similar reason would not be a matter of concern to admiralty. If the product is intended to be used in the maritime environment by people engaged in maritime activities, and if the injury occurs within that context, the wrong is a matter of maritime concern, despite the fact that it might occur under analogous circumstances on land.

"In determining whether the causation and nature of injury had a sufficient maritime flavor, other courts have focused on the site of consummation of the injury rather than on the origin of the negligent act or omission." *Solano v. Beilby*, 761 F.2d 1369, 1372 (9th Cir. 1985) (longshoreman injured by automobile with defective brakes being loaded on ship). That appears to be the accepted view in defective product cases. *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) (death in navigable waters caused by defective helicopter); *Sperry Rand Corp. v. Radio Cor-*

poration of America, 618 F.2d 319 (5th Cir. 1980) (grounding and collision caused by defective gyro-pilot steering system not designed exclusively for marine use); *JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976) (sinking of shrimp boat caused by defective design and manufacture of shaft assembly); *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978) (property damage to vessel caused by defective caterpillar engine adopted for marine use); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (sinking of vessel caused by defective Caterpillar engine); *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), (economic damages caused by defective Caterpillar engine).[5] There is no conflict in the circuits on this point.

Coast Catamaran also says that it was purely "fortuitous" that these electrocutions occurred on navigable waters. (Petition at p. 7.) That assertion overstates the case, for it is obvious that the boat was being used in a manner within the intended use of the boat. An intended use is reasonably expected, not fortuitous. Perhaps if the sailboat mast were being erected as a flag pole on the top of a skyscraper, the manner of its use would be justly termed "fortuitous," but that is not the case here.

The unspoken objection which seems to underlie Coast Catamaran's argument is that these were recreational

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[5]There is an obvious analogy between a marine engine and a sailboat mast. The District Court described the Hobie Cat mast as "an integral component of the vessel, and indeed one indispensable to its navigation." 627 F.Supp. 74.

sailors maneuvering a recreational vessel. Indeed, that is the only distinction that may properly be drawn between the present case and the product liability cases cited by Coast Catamaran in its brief, but it is not a valid distinction after *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982). Admiralty's concerns extend to recreational sailors engaged in traditional maritime activities. The Fourth Circuit correctly held that the nexus test of *Executive Jet* was satisfied.

Thus, Coast Catamaran has failed to show any conflict in federal decisions or any error by the Fourth Circuit in the analysis of admiralty nexus required by *Executive Jet*. To the contrary, the Fourth Circuit followed the overwhelming weight of federal authority in the courts of appeals, and there is no reason for this Court to address a question of admiralty nexus in which all cases are in harmony.

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CONCLUSION

The petitions for a writ of certiorari should be denied. The Fourth Circuit's decision is not in conflict with the decisions of this Court or of any circuit court of appeals. There are no constitutional issues. There are no important federal questions meriting the attention of this Court.

Respectfully submitted,

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Dated June 6, 1986

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